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No. 85-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HOU HAWAIIANS,

Petitioner,

v.

STATE OF HAWAII, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below properly ruled that the Hou Hawaiians did not qualify for 28 U.S.C. § 1362 jurisdiction, after the Hous submitted extensive briefing, at the request of the court which did not establish that the Hou or their governing body have been "duly recognized" by the Secretary of the Interior for the purposes of § 1362 jurisdiction.

2. Whether the court below properly dismissed the Hous' claims against the State of Hawaii, its Department of Transportation and its Department of Budget and Finance because of the Eleventh Amendment's bar to suits against a state, absent a waiver of the State's sovereign immunity.

3. Whether the court below properly dismissed the Hous' claims against George Ariyoshi in his capacity as governor because the Hou could not claim a private cause of action under the Admission Act.

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STATUTES:

28 U.S.C. Section 1362 ..... *passim*

Section 5(f), Hawaii Admission Act ..... *passim*

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondents, the State of Hawaii, the Department of Transportation, the Department of Budget and Finance, and Governor George Ariyoshi, respectfully pray that a Writ of Certiorari not issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unanimous opinion of the Ninth Circuit Court of Appeals issued in 1985 is reported as *Price* v. *State*

of Hawaii, 764 F.2d 623. The opinion is reprinted as Appendix "4" of the Appendix to the Petition. The Orders Granting Motion to Dismiss and Denying Motion for Reconsideration of Order Granting Motion to Dismiss of the U.S. District Court for the District of Hawaii from which the appeal was taken are set forth as Appendix "1" and "2" respectively in the Appendix to the Petition.

JURISDICTION

The jurisdictional statutes relied upon by Petitioner in the First Amended Complaint are: (1) 28 U.S.C. § 1331; (2) Section 5(f) of the Admission Act; and (3) 28 U.S.C. § 1362. In the Ninth Circuit Court of Appeals, jurisdiction was based on 28 U.S.C. § 1291. No rehearing of the Ninth Circuit's decision was sought. Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 2101.

STATUTES INVOLVED

28 U.S.C. § 1362, commonly referred to as the Indian Tribal Jurisdictional Act, provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Another relevant statute involved in this case is Section 5(f) of the Hawaii Admission Act, reprinted as Appendix "5" in the Appendix to the Petition.

STATEMENT OF THE CASE

A native Hawaiian tribal body brought action against the State of Hawaii, its Departments of Transportation and Budget and Finance and Governor Ariyoshi, in his capacity as Governor, to compel the State to apply a "just and fair portion" of the proceeds of the lands described in Section 5(f) of the Admission Act to "betterment of conditions of native Hawaiians."

Specifically, Petitioner requested the following relief:

(1) An accounting of all section 5(f) funds;

(2) A "just and fair portion of future revenues" from 5(f) lands, not less than 20% of such future revenues, which funds are to be administered by the Department of Hawaiian Home Lands (not a party to this action); the Office of Hawaiian Affairs (not a party to this action); themselves; and monitored by the United States Department of the Interior (not a party to this action);

(3) Damages against the Respondents "for past neglect in failing to properly administer the funds"; and

(4) The use of the award to secure matching federal funds to implement the Hawaiian Homes Commission Act.

Petitioner predicated its claim upon section 5(f) of the Admission Act and alleged that they were the "legal equivalent to a Federally recognized Indian tribe" within the meaning of 28 U.S.C. § 1362. Petitioner argued that since the text of section 5(f) authorizes the United States to bring suit against the State, pursuant to the "co-plaintiff" doctrine recog-

nized in *Moe* v. *Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 43 L.Ed.2d 96 (1976), they were entitled to sue to protect the "tribe's" rights.

The District Court granted the State's motion to dismiss on the ground that the decision in *Keaukaha-Panaewa Community Association* v. *Hawaiian Homes Commission,* 588 F.2d 1216 (9th Cir. 1978), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979) (*"Keaukaha I"*) compelled a finding that the District Court lacked subject matter jurisdiction over the Hous' suit, since Petitioner could not claim a private cause of action under the Admission Act.

In denying Petitioner's Motion for Reconsideration, the District Court pointed out that the "co-plaintiff" doctrine was not available to Petitioner because the United States is not a trustee of the section 5(f) ceded land trust and § 1362 did not operate to confer a federal cause of action in this case.

Subsequent to oral argument in the Ninth Circuit, the Court requested supplemental memoranda addressing the following issues:

(1) Are the Hou Hawaiians an Indian tribe or band with a governing body *duly recognized by the Secretary of the Interior*?

In regard to this question the Court pointed out that 28 U.S.C. §1362 does not grant jurisdiction to "legal equivalents." The Court also noted that the Hou Hawaiians are not listed by the Bureau of Indian Affairs as a tribe officially eligible to receive benefits.

(2) On what basis can this court imply a private cause of action for the Hou Hawaiians to enforce the Admission Act, when *Keaukaha-*

> *Panaewa Community Assoc.* v. *Hawaiian Homes Commission,* 588 F.2d 1216 (9th Cir. 1978), *cert. denied,* 444 U.S. 826 (1979), holds that Congress did not intend individual native Hawaiians to have a private cause of action?

In response to the Ninth Circuit's request, Petitioner submitted voluminous amounts of material for the Court's consideration, in response to the first question.

In *Price* v. *State of Hawaii, supra,* the decision reflects that the Court considered all the documents and material submitted by Petitioner and the relevant statutes governing the organization and recognition of Indian tribes and concluded that neither the Hou nor their governing body have been "duly recognized" by the Secretary of Interior. Thus, the Hou did not qualify for § 1362 jurisdiction, even if the Court assumes that they are an "Indian tribe or band."

In this Petition, the Hou seeks another "bite at the apple" in an attempt to demonstrate that they qualify for § 1362 jurisdiction, having been given every opportunity to do so, and having failed to support their contention.

REASONS FOR GRANTING THE WRIT

I. The Issues Raised By The Petition Are So Unusual That They Are Unlikely To Recur.

In support of its reasons why Certiorari should be granted, Petitioner complains that they have not been given a reasonable opportunity to prove its qualifications under 28 U.S.C. § 1362. (Petition at 21).

Even a cursory examination of the Ninth Circuit's decision negates such an argument. The Ninth Circuit

spent an exorbitant amount of time reviewing Petitioner's Opening Brief and extensive supplemental briefing submitted by Petitioner before resolving the question of whether the Hou qualify for § 1362 jurisdiction.

Since the Hous could not establish that they qualified for § 1362 jurisdiction the first time around, there seems to be little utility in this Court remanding the case to the District Court for an "evidentiary hearing," as suggested by Petitioner, in order to rehash the same arguments.

Petitioner has been afforded a full and fair opportunity to support its arguments at the Appellate Court level.

After laboring at length with a voluminous record, the Ninth Circuit Court of Appeals issued a comprehensive decision, concluding that the Hou failed to demonstrate eligibility for recognition, thus not qualifying for § 1362 jurisdiction, which opinion is well supported by logic, case law, and legal authority.

Given the thoroughness of the Ninth Circuit's analysis of the question of whether the Hou qualify for § 1362 jurisdiction, a further review of the issue presented by the Petition is unwarranted.

Additionally, it appears that the question of whether a native Hawaiian tribe is an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" is hardly likely to recur.

In the State of Hawaii there are numerous nonprofit and profit organizations, community groups,

associations, civic clubs, and a government agency, the Office of Hawaiian Affairs, devoted to the betterment of conditions of native Hawaiians.

None of the organizations has ever asserted or indicated that it is an "Indian tribe or band" or that its members are Indians. It is hardly likely that they ever will.

When native Hawaiians or native Hawaiian organizations litigate in both State and Federal Courts, they do so as "native Hawaiians."

Petitioner's further argument that the "combined effect of the lower court's decisions has been to lock Petitioner out of Federal Court" (Petition at 21, 32) is totally lacking in merit.

Both State and Federal Courts have entertained lawsuits instigated by native Hawaiians or native Hawaiian community associations relating to the State's trust obligations to native Hawaiians. See i.e. *Keaukaha-Panaewa Community Association* v. *Hawaiian Homes Commission,* 739 F.2d 1467 (9th Cir. 1984) (*"Keaukaha II"*); *Ahuna* v. *Department of Hawaiian Home Lands,* 64 Haw. 327, 640 P.2d 1161 (1982).

Furthermore, the Ninth Circuit's decision clearly indicates that the Hou have standing in Federal Court, in an appropriate case, with proper parties, proper issues to be resolved, and proper relief requested.

Obviously, this is not such a case.

The issue presented in this Petition relates to this case alone and is unlikely to be repeated. The writ requested should be denied.

II. The Decision By The Ninth Circuit Is In Accord With The Decision Of Every Court Which Has Addressed The Jurisdictional Reach Of Section 1362.

The District Court held that the "co-plaintiff doctrine" was not available to the Hou. The Ninth Circuit Court of Appeals agreed, stating:

> Under the "co-plaintiff" doctrine, Indian tribes may claim a private cause of action when the United States is a trustee and is entitled to sue to protect the tribe's rights. *See e.g., Keaukaha I,* 588 F.2d at 1224 n. 7; *Agua Caliente Band of Mission Indians* v. *County of Riverside,* 442 F.2d 1184, 1186 (9th Cir. 1971), *cert. denied,* 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972); *see also Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365, 366-72, 88 S.Ct. 982, 982-86, 19 L.Ed.2d 1238 (1968). But because the United States is not a formal trustee of the § 5(f) homelands trust, *see Keaukaha I,* 588 F.2d at 1224 n. 7, and nothing in the legislative history or case interpretation indicates that Congress intended a different result for the § 5(f) ceded land trust at issue here, we hold that the Hou cannot claim a private cause of action under the "co-plaintiff" doctrine. 764 F.2d at 631.
>
> *See also Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 39 L.Ed.2d 73 (1974); *Gila River Indian Community* v. *Henningson, etc.,* 626 F.2d 708 (9th Cir. 1980); *Mescalero Apache Tribe* v. *Burgett Floral Co.,* 503 F.2d 336 (10th Cir. 1975); *Pueblo of Isleta* v. *Universal Constructors, Inc.,* 570 F.2d 300 (10th Cir. 1978).

Since there is no conflict in the decisions of the various circuits in regard to the jurisdictional reach of § 1362, there seems to be no plausible reason to review the lower Court's conclusion.

III. The Ninth Circuit's Decision That This Suit Against The State Is Barred By The Eleventh Amendment Is Too Well Established To Require Further Review By This Court.

The Ninth Circuit noted that The State of Hawaii had not waived its sovereign immunity from suit and asserted its constitutional protection under the Eleventh Amendment.

The Court, after citing *Edelman* v. *Jordan,* 415 U.S. 651, 39 L.Ed.2d 662 (1974) and *Pennhurst State School & Hospital* v. *Halderman,* 465 U.S. 89, 79 L.Ed.2d 67 (1984) ("Pennhurst II"), concluded:

> Although the text of the Admission Act unmistakably authorizes the United States to bring suit against the State, we find no express language or legislative history proving that the State has lost its sovereign immunity from suit by the Hou. The Hous' claims against the State of Hawaii, its Department of Transportation, and its Department of Budget and Finance are therefore dismissed. 764 F.2d at 629.

A long line of Supreme Court cases and federal cases has addressed the issue of a State's constitutional protection under the Eleventh Amendment. Certain well established principles have emerged from the plethora of cases on the subject matter.

Clearly, further review of a State's protection under the Eleventh Amendment is not required in this instance, since the State itself is being sued in this action.

IV. It Is Clear That The Hous' Cannot Claim A Private Cause Of Action Under The Admission Act.

One of the issues in *Keaukaha I* was whether individual native Hawaiians had a private cause of action to enforce the Admission Act. This Court denied certiorari in that case. [*See* 444 U.S. 826 (1979)].

The Ninth Circuit requested supplemental briefing on the issue of whether the Court could imply a private cause of action for the Hou Hawaiians to enforce the Admission Act when *Keaukaha I* held that Congress did not intend individual native Hawaiians to have a private cause of action.

Obviously, Petitioner did not satisfy the Court that the Hou, as distinguished from individual native Hawaiians, enjoyed a private cause of action. The Court stated in relevant part:

> [N]othing in the legislative history of the Admission Act indicates that Congress intended native Hawaiian groups as distinguished from individual Hawaiians whose claims were rejected in *Keaukaha I* to enjoy a private cause of action. 764 F.2d at 631.

Thus, the claim against Governor George Ariyoshi was properly dismissed.

CONCLUSION

Petitioner has cited to no authority which supports its contentions. One need only to read the Ninth Circuit Court's scholarly and careful opinion to realize that the Court gave Petitioner every opportunity to establish that it was entitled to § 1362 jurisdiction as an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," and it could not do so.

Additionally, Petitioner's contention is not a matter of national concern. It is a purely local matter, does not reach the level of "extraordinary magnitude," and is not likely to recur.

The court applied the correct principles of law and properly and correctly reached the right result. There being no error, the Petition should be denied.

DATED: Honolulu, Hawaii, December 2, 1985.

Respectfully submitted,

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